12-10

No.

In the Supreme Court of the United States

UNITED STATES AGENCY FOR INTERNATIONAL DEVELOPMENT, ET AL., PETITIONERS

v.

ALLIANCE FOR OPEN SOCIETY INTERNATIONAL, INC., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the United States Leadership Against HIV/AIDS, Tuberculosis, and Malaria Act of 2003, 22 U.S.C. 7631(f), which requires an organization to have a policy explicitly opposing prostitution and sex trafficking in order to receive federal funding to provide HIV and AIDS programs overseas, violates the First Amendment.

PARTIES TO THE PROCEEDINGS

Petitioners are the United States Agency for International Development; Rajiv Shah, Administrator of the United States Agency for International Development; the United States Department of Health and Human Services; Kathleen Sebelius, Secretary of the United States Department of Health and Human Services; the United States Centers for Disease Control and Prevention; and Thomas R. Frieden, the Director of the United States Centers for Disease Control and Prevention.

Respondents are Alliance for Open Society International, Inc., Pathfinder International, Global Health Council, and InterAction.

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PETITION FOR A WRIT OF CERTIORARI

The Solicitor General, on behalf of the United States Agency for International Development, the United States Department of Health and Human Services, the United States Centers for Disease Control and Prevention, and officials of those agencies, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-96a) is reported at 651 F.3d 218. The order of the court of appeals denying rehearing en banc over the dissent of three judges (App., *infra*, 97a-111a) is reported at 678 F.3d 127. The relevant orders of the district court

(App., *infra*, 112a-252a) are reported at 430 F. Supp. 2d 222 and 570 F. Supp. 2d 533.

JURISDICTION

The judgment of the court of appeals was entered on July 6, 2011. A petition for rehearing was denied on February 2, 2012 (App., *infra*, 98a). On April 20, 2012, Justice Ginsburg extended the time within which to file a petition for a writ of certiorari to and including July 2, 2012. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED

The First Amendment to the United States Constitution provides in pertinent part that "Congress shall make no law * * * abridging the freedom of speech." Relevant statutory and regulatory provisions are reproduced in the appendix to this petition. App., *infra*, 253a-336a.

STATEMENT

1. a. This case presents a constitutional challenge to the United States Leadership Against HIV/AIDS, Tuberculosis, and Malaria Act of 2003 (Leadership Act or Act), 22 U.S.C. 7601 *et seq.* That Act responded to Congress's finding that the global spread of HIV/AIDS had infected more than 65 million people worldwide, killing 25 million and leaving more than 14 million orphaned children. See 22 U.S.C. 7601(2). Congress found that the spread of HIV/AIDS had assumed "pandemic proportions, * * * leaving an unprecedented path of death and devastation." 22 U.S.C. 7601(1). As of 2003, HIV/AIDS was the fourth-highest cause of death across the globe, and the President termed addressing it "one

of the most urgent needs of the modern world." Remarks on Signing the United States Leadership Against HIV/AIDS, Tuberculosis, and Malaria Act of 2003, 39 Weekly Comp. Pres. Docs. 663, 664 (May 27, 2003).

The Leadership Act is the primary component of the United States' effort to fight HIV/AIDS abroad. Under that Act, Congress has authorized the appropriation of billions of dollars for the President to establish "a comprehensive, integrated, [five]-year strategy to expand and improve efforts to combat global HIV/AIDS." 22 U.S.C. 7611(a) (2006 & Supp. IV 2010).[1] That comprehensive strategy must be designed to attack HIV/AIDS in multiple ways. Among other things, the strategy must include plans for providing care to those infected with HIV/AIDS; preventing further transmission of HIV infections, particularly among "families with children (including the prevention of mother-to-child transmission), women, young people, orphans and vulnerable children"; expanding efforts with other public and private entities to improve HIV/AIDS prevention and treatment programs; and accelerating research on prevention methods. 22 U.S.C. 7611(a)(4), (5), (7), (9), (10) and (25) (2006 & Supp. IV 2010); see 22 U.S.C. 7603 (describing Congress's goals in the Leadership Act).

b. As part of the Act's multi-pronged approach to fighting HIV/AIDS, Congress paid close attention to the underlying social conditions that foster its spread. For instance, Congress found that "[w]omen are four times more vulnerable to infection than are men and are be-

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[1] Congress authorized $15 billion for the effort to combat HIV/AIDS, malaria, and tuberculosis for the period from 2004 to 2008, see 22 U.S.C. 7671(a) (2006), and it has since authorized an additional $48 billion for the period from 2008 to 2013, see 22 U.S.C. 7671(a) (2010).

coming infected at increasingly high rates, in part because many societies do not provide poor women and young girls with the social, legal, and cultural protections against high risk activities that expose them to HIV/AIDS." 22 U.S.C. 7601(3)(B). Congress noted that "[w]omen and children who are refugees or are internally displaced persons are especially vulnerable to sexual exploitation and violence, thereby increasing the possibility of HIV infection." 22 U.S.C. 7601(3)(C); see 22 U.S.C. 7601(3)(A) ("At the end of 2002, * * * more than 3,200,000 [of those individuals infected with HIV/AIDS worldwide] were children under the age of 15 and more than 19,200,000 were women.").

To prevent the transmission of HIV/AIDS among those high-risk groups, Congress addressed the conditions and behaviors that were responsible for placing them at risk. See 22 U.S.C. 2151b-2(d)(1)(A) (2006 & Supp. IV 2010) (directing that HIV/AIDS funding be used to "help[] individuals avoid behaviors that place them at risk of HIV infection"). Specifically, the Leadership Act "make[s] the reduction of HIV/AIDS behavioral risks a priority of all prevention efforts," including by promoting abstinence and monogamy, encouraging the proper use of condoms, and supporting drug prevention and treatment programs. 22 U.S.C. 7611(a)(12)(A), (B) and (E) (2006 & Supp. IV 2010). As especially relevant here, the Act requires "educating men and boys about the risks of procuring sex commercially and about the need to end violent behavior toward women and girls"; "promot[ing] alternative livelihoods, safety, and social reintegration strategies for commercial sex workers"; and "working to eliminate rape, gender-based violence, sexual assault, and the sexual exploitation of

women and children." 22 U.S.C. 7611(a)(12)(F), (H) and (J) (2006 & Supp. IV 2010).[2]

As part of its emphasis on addressing behaviors that create a particular risk of HIV infection, Congress made a considered decision to pursue the reduction of prostitution and sex trafficking, particularly in developing countries where most of the federally-funded programs at issue are provided. In enacting the Leadership Act, Congress found that "[t]he sex industry, the trafficking of individuals into such industry, and sexual violence are additional causes of and factors in the spread of the HIV/AIDS epidemic." 22 U.S.C. 7601(23). In Cambodia, for example, "as many as 40 percent of prostitutes are infected with HIV and the country has the highest rate of increase of HIV infection in all of Southeast Asia." *Ibid.* Among female prostitutes in certain areas of Thailand and India, the rates of HIV/AIDS infection were even higher. See *Trafficking in Women & Children in East Asia & Beyond: A Review of U.S. Policy, Hearing Before Subcomm. on East Asian & Pacific Affairs of Sen. Comm. on Foreign Relations*, 108th Cong., 1st Sess. 18 (2003) (statement of Sen. Brownback, Chairman, Subcomm. on East Asian and Pacific Affairs). Moreover, prostitution fuels the demand for interna-

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[2] In prioritizing the reduction of behavioral risks for HIV/AIDS, Congress invoked the success of the HIV/AIDS programs implemented by Uganda between 1991 and 2000. See 22 U.S.C. 7601(20). Uganda had urged citizens to abstain from premarital sex, to be faithful to sexual partners, and to use condoms. See 22 U.S.C. 7601(20)(C). Congress directed that similar messages be promoted to combat HIV/AIDS worldwide. See 22 U.S.C. 2151b-2(d)(1)(A), 7611(a)(12) (2006 & Supp. IV 2010).

tional sex trafficking of women and children. See *id.* at 18-19.[3]

2. Pursuant to the Leadership Act, the United States has provided billions of dollars to nongovernmental organizations so that they can assist in the fight against the HIV/AIDS epidemic overseas. See 22 U.S.C. 2151b-2(c), 7671 (2006 & Supp. IV 2010). In order to ensure that those funds are spent consistently with the Act's objectives, Congress has placed two limitations on the use of those funds. First, 22 U.S.C. 7631(e) provides that no funds made available under the Act "may be used to promote or advocate the legalization or practice of prostitution or sex trafficking." Second, 22 U.S.C. 7631(f)—the provision at issue in this case—provides that no funds made available under the Act "may be used to provide assistance to any group or organization that does not have a policy explicitly opposing prostitution and sex trafficking." That statutory restriction does not apply to the Global Fund to Fight AIDS, Tuberculosis and Malaria; the World Health Organization; the International AIDS Vaccine Initiative; or to any United Nations agency. See *ibid.*

The Department of Health and Human Services (HHS) and the United States Agency for International

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[3] In enacting the Trafficking Victims Protection Act of 2000 (TVPA), 22 U.S.C. 7101, Congress sought to eliminate the global criminal trade in persons, in which 700,000 individuals are trafficked each year into forced prostitution and other forms of modern-day slavery. See 22 U.S.C. 7101(a), (b)(1)-(3) and (8). Like the Leadership Act, the TVPA (as amended in 2003) prohibits the use of federal funding "to promote, support, or advocate the legalization or practice of prostitution," and further provides that federal funding to rescue and assist the victims of severe forms of trafficking will be provided only to organizations that state that they do not "promote, support, or advocate the legalization or practice of prostitution." 22 U.S.C. 7110(g)(1)-(2).

Development (USAID) are the federal agencies primarily responsible for funding programs and services under the Leadership Act. They have implemented Section 7631(f)'s funding eligibility condition in similar ways. HHS has promulgated a regulation that, in its current form, requires the recipient of any grant, cooperative agreement, or other funding arrangement to agree in the award document that the recipient is "opposed to the practices of prostitution and sex trafficking because of the psychological and physical risks they pose for women, men, and children." 45 C.F.R. 89.1. Likewise, USAID has issued an Acquisition & Assistance Policy Directive that requires the recipient of any contract, grant, or cooperative agreement under the Leadership Act to agree in the award document that the recipient is opposed to prostitution and sex trafficking because of the psychological and physical harms they cause to women, men, and children. See App., *infra*, 299a-336a.

3. Respondents Alliance for Open Society International, Inc. (AOSI) and Pathfinder International (Pathfinder) are nongovernmental organizations that receive funding for overseas HIV/AIDS prevention programs under the Leadership Act. In 2005, they brought suit against HHS, USAID, and other federal agencies and officials, alleging that Section 7631(f) violates the First Amendment by conditioning their receipt of Leadership Act funds on the affirmative adoption of a policy opposing prostitution. In 2006, the district court granted respondents AOSI and Pathfinder preliminary injunctive relief. App., *infra*, 112a-219a. Applying heightened scrutiny, *id.* at 164a, 196a, the court held that Section 7631(f) is not narrowly tailored to Congress's interest in eradicating prostitution as part of its strategy to combat HIV/AIDS, imposes a viewpoint-based restriction on

respondents' use of funds, and impermissibly compels private speech. *Id.* at 198a-214a.

While the government's appeal of that decision was pending, HHS and USAID developed guidelines that allow recipients to establish and work with separate affiliates that are not funded under the Act and thus are not subject to Section 7631(f). Those guidelines permit an organization to remain eligible for funding and yet be affiliated with a group that "engages in activities inconsistent with the recipient's opposition to the practices of prostitution and sex trafficking," so long as the organization that receives funding has "objective integrity and independence from any affiliated organization." 45 C.F.R. 89.3; see App., *infra*, 297a, 309a. Whether a recipient is independent from affiliated organizations depends on the totality of the circumstances, including such factors as whether the groups are legally distinct and maintain separate personnel, records, facilities, and forms of identification. See 45 C.F.R. 89.3(b); App., *infra*, 298a, 309a-310a.

In light of the new guidelines, the court of appeals remanded for the district court to determine whether preliminary injunctive relief continued to be appropriate. App., *infra*, 224a. On remand, the district court held that the newly-issued guidelines did not affect its previous decision. *Id.* at 241a-250a. The district court also extended injunctive relief to two new plaintiffs named in an amended complaint, respondents Global Health Council (GHC) and InterAction, which are associations of nongovernmental organizations that collectively include most of the groups based in the United States that receive funding under the Leadership Act. *Id.* at 251a-252a. The government again appealed, and while that second appeal was pending, HHS and USAID

promulgated further guidance that allows funding recipients additional flexibility in partnering with affiliates not subject to Section 7631(f).

4. a. A divided panel of the court of appeals affirmed. App., *infra*, 1a-96a. The court held that Section 7631(f) "likely violates the First Amendment by impermissibly compelling [respondents] to espouse the government's viewpoint on prostitution." *Id.* at 17a. According to the court, Section 7631(f) "falls well beyond * * * permissible funding conditions," because "[it] does not merely restrict recipients from engaging in certain expression * * * but pushes considerably further and mandates that recipients affirmatively *say* something." *Id.* at 25a. The panel also observed that Section 7631(f) is "viewpoint-based, because it requires recipients to take the government's side on a particular issue." *Id.* at 27a. The panel recognized that the government may require "affirmative, viewpoint-specific speech as a condition of participating in a federal program," but only where "the government's program *is*, in effect, its message." *Id.* at 32a. Here, the panel concluded, the purpose of the Leadership Act is to fight HIV/AIDS, and in its view advocacy against prostitution is not central to that mission. *Id.* at 32a-34a. The panel rejected the government's argument that, "because any entity unwilling to state its opposition to prostitution can form an affiliate that does so," "any compelled-speech type problems" are alleviated by the HHS and USAID guidelines. *Id.* at 35a-36a.

b. Judge Straub dissented on the ground that Section 7631(f) "neither imposes a coercive penalty on protected First Amendment rights nor discriminates in a way aimed at the suppression of any ideas." App., *infra*, 37a. A funding condition "cabined to the federal subsidy

program to which it is attached" has no "coercive force" even if it "limit[s] or affect[s] speech," Judge Straub reasoned, because potential recipients "can simply choose not to accept the funds." *Id.* at 55a-56a. After surveying this Court's decisions addressing conditions on government subsidies, Judge Straub reasoned that those cases allow the government to "insist[] that public funds be spent for the purposes for which they were authorized." *Id.* at 73a (quoting *Rust* v. *Sullivan*, 500 U.S. 173, 196 (1991)). In Judge Straub's view, Section 7631(f) "does precisely that" because Congress "only authorized federal funds for organizations that shared its desire to affirmatively reduce HIV/AIDS behavioral risks, including its policy of eradicating prostitution." *Id.* at 74a. Finally, Judge Straub observed, the agencies' guidelines leave funding recipients able "to remain silent or to espouse a pro-prostitution message with non-Leadership Act funds." *Id.* at 77a.

5. The court of appeals denied rehearing en banc, over the dissent of three judges and with the concurrence of one other judge. App., *infra*, 97a-111a.

a. Judge Cabranes (joined by Judges Raggi and Livingston) concluded that en banc review was appropriate because "[t]he question presented is indisputably one of exceptional importance," App., *infra*, 98a; "the panel decision 'splits' from the District of Columbia Circuit, which rejected a nearly identical challenge," *id.* at 103a (citing *DKT Int'l, Inc.* v. *USAID*, 477 F.3d 758 (D.C. Cir. 2007)); and "[t]he decision of the panel majority * * * is based on a newly uncovered constitutional distinction between 'affirmative' and 'negative' speech restrictions," *id.* at 99a. According to Judge Cabranes, "it is clear that the disposition of this case turns not on the existing jurisprudential framework, but on an

affirmative-negative paradigm of the panel's own invention." *Id.* at 103a.

b. Judge Pooler concurred in the denial of rehearing en banc. App., *infra*, 106a-111a. In her view, "[t]he unconstitutional conditions doctrine is messy and unsettled," and she deemed it unsurprising that the panel decision had "created a circuit split." *Id.* at 107a-108a. Judge Pooler suggested that en banc review would have "precious little prospect of resolving any of the current doctrinal disarray," because the en banc court's resolution of the question "simply could not substitute for the Supreme Court's attention." *Id.* at 108a, 110a; cf. *id.* at 100a n.2 (Cabranes, J., dissenting from the denial of rehearing en banc) ("Judge Pooler would prefer the Supreme Court's attention. So be it.") (internal quotation marks omitted).

REASONS FOR GRANTING THE PETITION

Over a three-judge dissent from the denial of rehearing en banc, the Second Circuit enjoined on constitutional grounds a provision in an Act of Congress. That provision imposes a condition on the receipt of billions of dollars in federal aid, to ensure that those funds are spent to combat the HIV/AIDS epidemic in the manner Congress intended. Congress provides those funds to nongovernmental organizations for foreign programs as part of a strategy that seeks not only to treat HIV/AIDS but to reduce the behavioral risks that foster its spread. As part of that strategy, Congress requires funding recipients to "have a policy explicitly opposing prostitution and sex trafficking." 22 U.S.C. 7631(f). It does so to ensure that its partners in the fight against HIV/AIDS further Congress's chosen program and comport with Congress's determination that participating in the sex

trade or sex trafficking carries serious risks for women, men, and children across the globe.

By invalidating that condition on the acceptance of federal funds, the Second Circuit has undermined the government's ability to implement the comprehensive approach chosen by Congress. Two of the respondents are associations of nongovernmental organizations that collectively include most of the groups based in the United States that receive the HIV/AIDS funding at issue. As a consequence, the decision below effectively enjoins the operation of Section 7631(f) with respect to domestic organizations, and further proceedings in the district court cannot alter the Second Circuit's decision holding that provision unconstitutional. The Second Circuit has thus exercised "the grave power of annulling an Act of Congress," *United States* v. *Gainey*, 380 U.S. 63, 65 (1965), and the decision below warrants plenary review on that ground alone. But in addition, as the judges who dissented from the panel decision and the denial of rehearing en banc recognized, the decision below is inconsistent with this Court's precedents and in square conflict with the decision of the District of Columbia Circuit in *DKT Int'l, Inc.* v. *USAID*, 477 F.3d 758 (2007) (*DKT*). This Court's review is warranted.

A. The Court Of Appeals Invalidated A Significant Provision Of An Act Of Congress And Of An Important Federal Program

1. The Leadership Act directs the President to establish a comprehensive international strategy to fight the transmission of HIV/AIDS, with "the reduction of HIV/AIDS behavioral risks a priority of all prevention efforts." 22 U.S.C. 7611(a)(12) (2006 & Supp. IV 2010). Among other things, the Act seeks to reduce behavioral

risks by "educating men and boys about the risks of procuring sex commercially and about the need to end violent behavior toward women and girls"; "promot[ing] alternative livelihoods, safety, and social reintegration strategies for commercial sex workers"; and "working to eliminate rape, gender-based violence, sexual assault, and the sexual exploitation of women and children." 22 U.S.C. 7611(a)(12)(F), (H) and (J) (2006 & Supp. IV 2010). Congress thus directed that all prevention efforts funded under the Act should have as a priority the promotion of the government's goal that the underlying causes of HIV/AIDS, including prostitution and sex trafficking, should be reduced or eliminated.

In furthering and communicating that goal through the programs and services that the Leadership Act subsidizes, the government is entitled to "use criteria to ensure that its message is conveyed in an efficient and effective fashion." *DKT*, 477 F.3d at 762. It would make little sense for the government to provide billions of dollars for the treatment and prevention of HIV/AIDS, including for the reduction of behavioral risks like prostitution and sex trafficking, and yet to engage as partners in that effort organizations that are neutral toward or that even affirmatively disagree with efforts to oppose those types of behavior. Simply put, the effectiveness of the government's message would be substantially undermined if the same organizations hired to further the program's goals (including the reduction of prostitution and sex trafficking because of their role in the spread of HIV/AIDS) and to communicate that message through their provision of HIV/AIDS programs and services, could advance an opposite viewpoint in their privately-funded operations. Section 7631(f) does no more than to ensure that if respondents wish to re-

ceive funds under the Leadership Act, "[they] must communicate the message the government chooses to fund. This does not violate the First Amendment." *Id.* at 764.

2. This Court has recognized that although the government may speak through its own representatives, officers, or employees, it may also enlist the assistance of private entities or organizations to convey its chosen message. See, *e.g.*, *Rust* v. *Sullivan*, 500 U.S. 173, 193 (1991). When the government "is the speaker or when it enlists private entities to convey its own message," the government may "regulate the content of what is or is not expressed." *Rosenberger* v. *Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 833 (1995); see *ibid.* ("[W]hen the government appropriates public funds to promote a particular policy of its own it is entitled to say what it wishes."). For that reason, "[w]hen the government disburses public funds to private entities to convey a governmental message, it may take legitimate and appropriate steps to ensure that its message is neither garbled nor distorted by the grantee." *Ibid.*; see *Legal Servs. Corp.* v. *Velazquez*, 531 U.S. 533, 541 (2001) ("[V]iewpoint-based funding decisions can be sustained in instances * * * in which the government use[s] private speakers to transmit specific information pertaining to its own program.") (internal quotation marks omitted).[4]

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[4] A viewpoint-based funding condition is subject to heightened scrutiny when it is "aimed at the suppression of dangerous ideas," *Speiser* v. *Randall*, 357 U.S. 513, 519 (1958) (quoting *American Commc'ns Ass'n* v. *Douds*, 339 U.S. 382, 402 (1950)), but in this case respondents have not argued, and the panel majority did not conclude, that Section 7631(f)'s policy requirement is aimed at such suppression. As Judge Straub explained in dissent, "[t]here is simply no evidence that Congress's purpose in enacting the Leadership Act and attaching the Policy

Here, Congress found in enacting the Leadership Act that "[t]he sex industry, the trafficking of individuals into such industry, and sexual violence are additional causes of and factors in the spread of the HIV/AIDS epidemic." 22 U.S.C. 7601(23); see p. 5, *supra*. Congress therefore concluded that a comprehensive strategy to address HIV/AIDS should attempt to reduce prostitution and sex trafficking in countries where the federally-funded programs at issue are provided. "Spending money to convince people at risk of HIV/AIDS to change their behavior is necessarily a message," *DKT*, 477 F.3d at 761, and Congress has required private organizations to adhere to that message by adopting a policy that explicitly opposes prostitution and sex trafficking. See, *e.g.*, *South Dakota* v. *Dole*, 483 U.S. 203, 206 (1987) (Under the Spending Clause, Congress has the power to "attach conditions on the receipt of federal funds, and has repeatedly employed the power 'to further broad policy objectives by conditioning receipt of federal moneys upon compliance by the recipient with federal statutory and administrative directives.'") (quoting *Fullilove* v. *Klutznick*, 448 U.S. 448, 474 (1980)).

In light of Congress's findings, Section 7631(f)'s policy requirement is plainly a "legitimate and appropriate" means to ensure that the government's goals are advanced and its message communicated wherever the Act's funds are spent. *Rosenberger*, 515 U.S. at 833. That is especially true in light of the acute difficulties of monitoring the way in which private organizations pro-

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Requirement was to suppress pro-prostitution views," and "[t]he Policy Requirement and Guidelines therefore in no way silence government criticism or contrary views on prostitution and HIV/AIDS." App., *infra*, 83a-84a.

vide HIV/AIDS programs and services throughout the world. The policy requirement helps to guarantee that the organizations receiving Leadership Act funds act consistently with Congress's goals in their overseas operations. In addition, the affiliation guidelines issued by HHS and USAID cabin the effects of Section 7631(f)'s funding condition to the scope of Leadership Act programs and services and thus minimize any burden on respondents' First Amendment rights. See pp. 26-28, *infra*.

3. The panel majority reasoned that the Act's policy requirement is impermissible because it affirmatively compels speech by the recipients of the Act's funds. See App., *infra*, 25a. This Court has never held, however, that it matters whether conditions on the receipt of federal funding compel speech or silence. Indeed, the Court has held that the distinction is without constitutional significance in the context of the direct regulation of speech. See *Riley* v. *National Fed'n of the Blind of N.C., Inc.*, 487 U.S. 781, 796 (1988) ("There is certainly some difference between compelled speech and compelled silence, but in the context of protected speech, the difference is without constitutional significance."). There is no reason, then, that the distinction should assume constitutional significance in the context of funding conditions, where recipients may avoid the conditions altogether simply by declining to accept the federal funds at issue. See, *e.g.*, *Rust*, 500 U.S. at 199 n.5 ("[T]o avoid the force of the regulations, [the recipient] can simply decline the subsidy."); *Grove City Coll.* v. *Bell*, 465 U.S. 555, 575 (1984) ("[The recipient] may terminate its participation in the [federal] program and thus avoid the requirements.").

The reasoning of this Court's decisions on funding conditions likewise lends no support to the panel majority's novel affirmative-negative dichotomy. In *Rust*, for instance, the Court upheld against a First Amendment challenge restrictions that barred federally-funded family-planning programs from providing abortion counseling or encouraging abortion as a method of family planning. See 500 U.S. at 179-181, 192-193. The Court recognized that "[t]he [g]overnment can, without violating the Constitution, selectively fund a program to encourage certain activities it believes to be in the public interest." *Id.* at 193. Similarly, in *Regan* v. *Taxation With Representation*, 461 U.S. 540 (1983), this Court upheld a restriction on lobbying by nonprofit organizations that were allowed to receive tax-deductible contributions. See *id.* at 550. The Court held that Congress did not violate the First Amendment by choosing "not to subsidize lobbying as extensively as it chose to subsidize other activities that nonprofit organizations undertake to promote the public welfare." *Id.* at 544.

Those cases do not suggest that the constitutionality of a federal funding condition under the First Amendment turns on whether the recipient must espouse a message that the government funding is intended to promote or refrain from espousing a message that is contrary to the funding program. In either case, what matters is that the government has elected to selectively fund a program aimed at encouraging or discouraging certain activities of public interest: abortion counseling in *Rust*, certain types of lobbying in *Regan*, and foreign prostitution and sex trafficking in this case. See App., *infra*, 99a (Cabranes, J., dissenting from the denial of rehearing en banc) ("The decision of the panel majority * * * is based on a newly uncovered constitutional dis-

tinction between 'affirmative' and 'negative' speech restrictions."); *id.* at 103a ("[I]t is clear that the disposition of this case turns not on the existing jurisprudential framework, but on an affirmative-negative paradigm of the panel's own invention.").

4. The panel majority did not rest its decision solely on its distinction between affirmative and negative restrictions on speech. Indeed, the panel majority acknowledged that in some circumstances the government may require "affirmative, viewpoint-specific speech as a condition of participating in a federal program." App., *infra*, 32a; see *ibid.* ("[I]f the government were to fund a campaign urging children to 'Just Say No' to drugs, we do not doubt that it could require grantees to state that they oppose drug use by children."). But that is so, the panel majority reasoned, when "the government's program *is*, in effect, its message." *Ibid.* In the panel majority's view, that is not the case here because "[t]he stated purpose of the Leadership Act is to fight HIV/AIDS" rather than to fight prostitution and sex trafficking. *Ibid.* (emphasis omitted); see *id.* at 32a-33a ("[Petitioners] cannot now recast the Leadership Act's global HIV/AIDS-prevention program as an anti-prostitution messaging campaign.").

That approach cannot be correct. In cases involving restrictions challenged on First Amendment grounds, it would require courts to decide, on a case-by-case basis, which of Congress's funding conditions are truly critical to the federal programs to which they are attached. Courts would have to decide whether, in their view, Congress's chosen message is "central" rather than "subsidiary" to a given federal funding program. App., *infra*, 33a (internal quotation marks omitted). See, *e.g.*, *Village of Arlington Heights* v. *Metropolitan Hous. Dev.*

Corp., 429 U.S. 252, 265 n.11 (1977) ("Legislation is frequently multipurposed: the removal of even a 'subordinate' purpose may shift altogether the consensus of legislative judgment supporting the statute.") (quoting *McGinnis* v. *Royster*, 410 U.S. 263, 276-277 (1973)); *McGinnis*, 410 U.S. at 276 ("[O]ur decisions do not authorize courts to pick and choose among legitimate legislative aims to determine which is primary and which subordinate.").

Even taking the court of appeals' test on its own terms, however, the panel majority erred in holding that Section 7631(f)'s policy requirement is not central to the purposes of the Leadership Act. App., *infra*, 32a-34a. As explained above, Congress did not want to address only the *effects* of HIV/AIDS; it also wanted to address the *causes* of its transmission, including types of behavior, like prostitution and sex trafficking, that place certain groups at high risk of contracting HIV/AIDS. See pp. 3-5, *supra*. Congress determined when it enacted the Leadership Act that reducing and eradicating prostitution and sex trafficking are of great importance in preventing the spread of HIV/AIDS. The panel majority suggested no appropriate basis for disagreeing with that legislative judgment. The government's message regarding prostitution and sex trafficking is an integral feature of the funding program. In this critical respect, in the panel's words, "the government's program *is*, in effect, its message." App., *infra*, 32a.

The panel majority reasoned that advocating against prostitution is not central to the Leadership Act because Section 7631(f) exempts certain entities. See 22 U.S.C. 7631(f) ("[T]his subsection shall not apply to the Global Fund to Fight AIDS, Tuberculosis and Malaria, the World Health Organization, the International AIDS

Vaccine Initiative or to any United Nations agency."). As a threshold matter, "the relevance of a statute's underinclusiveness is that it may reveal discrimination on the basis of viewpoint or content, or may undercut the statute's purported non-discriminatory purpose." *Ruggiero* v. *FCC*, 317 F.3d 239, 250-251 (D.C. Cir.), cert. denied, 540 U.S. 813 (2003). Here, "[b]ecause viewpoint discrimination raises no First Amendment concerns when the government is speaking, the underinclusiveness of the certification requirement is immaterial." *DKT*, 477 F.3d at 763 n.5; see *Regan*, 461 U.S. at 547-548 (upholding lobbying restrictions that applied to nonprofit organizations but exempted veterans' organizations).

In any event, the exempt entities are not similarly situated to the private nongovernmental organizations subject to Section 7631(f). One of the exempt entities, the International AIDS Vaccine Initiative (IAVI), is a nongovernmental organization that focuses on developing a vaccine for HIV/AIDS. See App., *infra*, 91a; 22 U.S.C. 2222(l) (2006 & Supp. IV 2010). Congress reasonably could have concluded that there is little risk IAVI will undermine the Leadership Act's opposition to prostitution and sex trafficking. The remaining exempt entities—the Global Fund to Fight AIDS, Tuberculosis and Malaria; the World Health Organization; and United Nations agencies—are public international organizations composed primarily or exclusively of sovereign states. See App., *infra*, 91a-92a. The terms of the United States' participation in those organizations are governed by treaties or international agreements. See 22 U.S.C. 288, note (2006 & Supp. IV 2010); Exec. Order No. 13,395, 3 C.F.R. 209 (2007). Congress could not unilaterally require those organizations to adopt policies

opposing prostitution or sex trafficking, and their international nature makes it unlikely that their views or actions will be specially attributed to the United States (particularly in light of Congress's clear message in the Leadership Act itself).

5. Finally, the panel majority sought to draw support for its decision from this Court's cases on compelled speech. See App., *infra*, 25a-26a; see also *Wooley* v. *Maynard*, 430 U.S. 705 (1977); *Speiser* v. *Randall*, 357 U.S. 513 (1958); *West Va. Bd. of Educ.* v. *Barnette*, 319 U.S. 624 (1943). Those cases, however, did not involve Congress's spending power. Rather, "[i]n each of those cases, the penalty for refusing to propagate the message was denial of an already-existing public benefit. None involved the government's selective funding of organizations best equipped to communicate its message." *DKT*, 477 F.3d at 762 n.2. As the District of Columbia Circuit has recognized, that distinction is critical. "Offering to fund organizations who agree with the government's viewpoint and will promote the government's program is far removed from cases in which the government coerced its citizens into promoting its message on pain of losing their public education, *Barnette*, 319 U.S. at 629, or access to public roads, *Wooley*, 430 U.S. at 715." *Ibid.* (parallel citations omitted).

By ignoring that critical distinction, the panel majority held unconstitutional a statutory condition on the receipt of federal funds that, in Congress's view, serves a valuable purpose: to ensure that a particular message—*i.e.*, that high-risk behaviors, including prostitution and sex trafficking, should be reduced as part of the fight against HIV/AIDS—is communicated effectively by private partners under the Leadership Act. That invalidation of an Act of Congress in itself warrants this

Court's review. Moreover, the decision below allows virtually all of the private entities that receive many billions of dollars in federal aid to advance the government's program to ignore a condition that Congress deemed important to their participation. If that decision is left unreviewed, the government will have to stand idly by while its private partners advance views that are inconsistent with or even directly contrary to, and that thus substantially undermine, the comprehensive strategy against HIV/AIDS outlined by Congress in the Act. That consequence alone warrants the grant of certiorari.

B. The Decision Below Creates A Square Circuit Conflict

1. The panel majority's approach in this case directly conflicts with the District of Columbia Circuit's decision in *DKT*. In *DKT*, the District of Columbia Circuit considered a First Amendment challenge to Section 7631(f) brought by a private organization, DKT International, Inc., that provided HIV/AIDS prevention programming in foreign countries in part with USAID grant funds. See 477 F.3d at 760-761. DKT refused to adopt a policy opposing prostitution "because this might result in stigmatizing and alienating many of the people most vulnerable to HIV/AIDS—the sex workers." *Id.* at 761 (internal quotation marks omitted). DKT argued that the policy requirement in Section 7631(f) was unconstitutional for the same reason that respondents have advanced: "it forces DKT to convey a message with which it does not necessarily agree." *Ibid.*

The District of Columbia Circuit rejected that argument. The court recognized that the government "may hire private agents to speak for it," *DKT*, 477 F.3d at 761 (citing *Rust*, 500 U.S. 173), and in communicating its message through private entities "the government

can—and often must—discriminate on the basis of viewpoint," *ibid.* (citing *Rosenberger*, 515 U.S. at 833). The court observed that the Leadership Act's "objective is to eradicate HIV/AIDS," and "[o]ne of the means of accomplishing this objective is for the United States to speak out against legalizing prostitution in other countries." *Ibid.* As the court explained, "[t]he Act's strategy in combating HIV/AIDS is not merely to ship condoms and medicine to regions where the disease is rampant," but also to "foster[] behavioral change, see, *e.g.*, 22 U.S.C. § 7601(22)(E), and spread[] 'educational messages,' *id.* § 7611(a)(4)." *Ibid.* The court reasoned that "convinc-[ing] people at risk of HIV/AIDS to change their behavior is necessarily a message." *Ibid.*

The District of Columbia Circuit thus disagreed with DKT's contention that the government had created "a program to encourage private speech." *DKT*, 477 F.3d at 762 (quoting *Rosenberger*, 515 U.S. at 833). Rather, the court held, the government is "us[ing] private speakers to transmit specific information pertaining to its own program," *ibid.* (quoting *Rosenberger*, 515 U.S. at 833), and "as in *Rust*, 'the government's own message is being delivered,'" *ibid.* (quoting *Velazquez*, 531 U.S. at 541). The court also rejected DKT's reliance on this Court's compelled-speech decisions, because in those cases "the penalty for refusing to propagate the message was denial of an already-existing public benefit," like access to "public education" or "public roads." *Id.* at 762 n.2. None of those cases, the court noted, "involved the government's selective funding of organizations best equipped to communicate its message." *Ibid.*

Because the government may "communicate a particular viewpoint through its agents and require those agents not convey contrary messages," the District of

Columbia Circuit reasoned, "it follows that in choosing its agents, the government may use criteria to ensure that its message is conveyed in an efficient and effective fashion." *DKT*, 477 F.3d at 762. According to the court, "[t]his is particularly true where the government is speaking on matters with foreign policy implications," as it is through the Leadership Act. *Ibid.* The court correctly concluded that "[t]he effectiveness of the government's viewpoint-based program would be substantially undermined, and the government's message confused, if the organizations hired to implement that program * * * could advance an opposite viewpoint in their privately-funded operations." *Id.* at 762-763 (internal quotation marks omitted).

2. The panel majority's reasoning in this case squarely conflicts with the District of Columbia Circuit's reasoning in *DKT*, which "rejected an almost identical challenge to the Leadership Act by a potential grantee that refused to adopt a policy opposing prostitution." App., *infra*, 94a (Straub, J., dissenting). Notably, the panel majority cited *DKT* once but made no effort to distinguish that case. See *id.* at 31a.[5] All of the judges who addressed the question at the rehearing en banc

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[5] The panel majority did distinguish a different, much earlier case, *DKT Memorial Fund Ltd.* v. *Agency for Int'l Dev.*, 887 F.2d 275 (D.C. Cir. 1989), on the ground that it "centered around a restriction on the First Amendment activities of *foreign* [nongovernmental organizations] receiving U.S. government funds." App., *infra*, 34a. That would not distinguish the District of Columbia's subsequent decision in *DKT*, which involved a U.S.-based nongovernmental organization. See 1:05-cv-1604 Doc. No. 1, at 4 (D.D.C. Aug. 11, 2005) ("Plaintiff DKT International is a U.S.-based, charitable organization providing family-planning and HIV/AIDS prevention services in eleven countries around the world."); see *id.* at 2 ("Plaintiff DKT International is a not-for-profit corporation with headquarters [in Washington, D.C.]").

stage therefore agreed that the panel decision and *DKT* are flatly inconsistent. See *id.* at 107a-108a (Pooler, J., concurring in the denial of rehearing en banc) ("The unconstitutional conditions doctrine is messy and unsettled," and thus it is "[not] surprising that our decision created a circuit split."); *id.* at 103a (Cabranes, J., dissenting from the denial of rehearing en banc) ("[T]he panel decision 'splits' from the District of Columbia Circuit, which rejected a nearly identical challenge to the Leadership Act by another grantee that refused to adopt a policy opposing prostitution.").

Moreover, when this case was remanded for consideration of the then-newly issued guidelines, the district court extended injunctive relief to two new plaintiffs named in an amended complaint, respondents GHC and InterAction, which are associations of nongovernmental organizations that collectively include most of the groups based in the United States that receive funding under the Leadership Act. See App., *infra*, 251a-252a.[6] It is therefore uncertain that there would be future litigation on this issue in other courts of appeals, because the lower courts' injunction here prevents the government from enforcing Section 7631(f) with respect to most of the U.S.-based organizations that receive funds

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[6] At the present time, the injunction extends to all members of both GHC and InterAction. Although GHC recently announced that it is closing its operations, see Global Health Council, *GLOBAL HEALTH COUNCIL TO CLOSE OPERATIONS* (Apr. 20, 2012), http://www.globalhealth.org, the courts below have not yet been asked to rule on the effect of that association's dissolution. In any event, as far as the government is aware there is no significant barrier to a GHC member's joining InterAction, which would mean that the government will remain unable to enforce Section 7631(f) with respect to most of the U.S.-based organizations that receive Leadership Act funds if the decision below is permitted to stand.

under the Leadership Act. The direct conflict between the Second and the District of Columbia Circuits warrants this Court's review in this case.

3. The decision below is in considerable tension with the decisions of this Court and several other circuits in another respect. The panel majority rejected the government's argument that, "because any entity unwilling to state its opposition to prostitution can form an affiliate that does so," "any compelled-speech type problems" are alleviated by the HHS and USAID guidelines. App., *infra*, 35a-36a. "It may very well be that the Guidelines afford [respondents] an adequate outlet for expressing their opinions on prostitution," the panel majority stated, "but there remains, on top of that, the additional, affirmative requirement that the recipient entity pledge its opposition to prostitution." *Id.* at 36a. According to the panel majority, that requirement—*i.e.*, that the entity receiving Leadership Act funds have a policy opposing prostitution and sex trafficking—renders the funding condition unconstitutional, even if an affiliated entity is free to take contrary positions on the sex trade and sex trafficking.

That reasoning is not consistent with this Court's decisions addressing similar affiliation guidelines. For instance, the restriction at issue in *Regan* prevented nonprofit organizations from lobbying with tax-deductible contributions, but a related provision permitted those organizations to form affiliates that could engage in lobbying activities. See 461 U.S. at 544. The Court noted that "dual structure" in upholding the restriction, *ibid.*, observing that an affected organization had not been denied "any independent benefit on account of its intention to lobby," *id.* at 545. See *id.* at 553 (Blackmun, J., concurring) (reasoning that the lobbying restriction

was permissible because of the affiliate provision); see also *Rust*, 500 U.S. at 198 ("Congress has merely refused to fund [abortion-related] activities out of the public fisc, and the Secretary has simply required a certain degree of separation from the [federal] project in order to ensure the integrity of the federally funded program."). By contrast, in *FCC* v. *League of Women Voters*, 468 U.S. 364 (1984), the Court invalidated a federal law prohibiting noncommercial television and radio stations that received federal grants from editorializing, but the Court noted that if Congress had permitted stations to "establish 'affiliate' organizations which could then use the station's facilities to editorialize with nonfederal funds, such a statutory mechanism would plainly be valid." *Id.* at 400.

In light of *Regan*, *League of Women Voters*, and *Rust*, other circuits have found that affiliation guidelines cure any constitutional difficulty, because they allow funding recipients to cabin the effects of a restriction on speech to the scope of the federally funded program at issue. See, *e.g.*, *DKT*, 477 F.3d at 763 ("Nothing prevents DKT from itself remaining neutral and setting up a subsidiary organization that certifies it has a policy opposing prostitution."); *Planned Parenthood of Mid-Mo. and E. Kan., Inc.* v. *Dempsey*, 167 F.3d 458, 463-464 (8th Cir. 1999) (upholding a Missouri statute that "requir[d] abortion services to be provided through independent affiliates"); *Legal Aid Soc'y* v. *Legal Servs. Corp.*, 145 F.3d 1017, 1026 (9th Cir.) (upholding, as "consistent with the decisions in *Regan* and *League of Women Voters*," regulations "requir[ing] that if a recipient wishes to engage in prohibited activities, it must establish an organization separate from the recipient in order to ensure that federal funds are not spent on prohibited activ-

ities"), cert. denied, 525 U.S. 1015 (1998). As other courts of appeals have recognized, affiliation guidelines like those promulgated by HHS and USAID ensure that recipients of federal funding are not effectively precluded from exercising their First Amendment rights.

The Second Circuit reasoned that the HHS and USAID affiliation guidelines do not cure any constitutional defect in this case because respondents must espouse a particular message rather than refrain from speaking. App., *infra*, 35a-36a. That simply misunderstands the First Amendment value of affiliate structures. Regardless of whether a funding condition requires the recipient to speak or remain silent, the relevant question is whether the condition "effectively prohibit[s] the recipient from engaging in the protected conduct outside the scope of the federally funded program." *Rust*, 500 U.S. at 197. Here, the affiliation guidelines—which are modeled on the program integrity requirements upheld in *Rust* but which have been made more flexible to account for the challenges of operating overseas—cabin the effects of Section 7631(f)'s funding condition to the scope of Leadership Act programs and services.[7]

C. This Case Is A Good Vehicle For Addressing Issues Of Recurring Importance

1. In addition to erroneously enjoining an Act of Congress on constitutional grounds, the panel majority's decision, by introducing a novel distinction between affirmative and negative restrictions on speech, unneces-

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[7] The affilation guidelines are modeled on the program integrity requirements in *Velazquez*, see *Velazquez* v. *Legal Servs. Corp.*, 164 F.3d 757, 761-762 (2d Cir. 1999), which in turn were modeled on those upheld in *Rust*.

sarily complicates the doctrine of unconstitutional conditions. See *Rust*, 500 U.S. at 205 (referring to the doctrine as "a troubled area of [this Court's] jurisprudence"); see also App. *infra*, 96a (Straub, J., dissenting) ("Because the majority today * * * does more to further complicate the doctrine [of unconstitutional conditions] than to clarify it, the Supreme Court may wish to grant certiorari to set us straight."); *id.* at 99a (Cabranes, J., dissenting from the denial of rehearing en banc) ("The decision of the panel majority * * * is based on a newly uncovered constitutional distinction between 'affirmative' and 'negative' speech restrictions."). Indeed, although Judge Pooler was a member of the panel majority, she recognized at the rehearing en banc stage that "[t]he unconstitutional conditions doctrine is messy and unsettled"; there is "current doctrinal disarray"; and in her view the en banc court's resolution of the question "simply could not substitute for the Supreme Court's attention." *Id.* at 107a-108a, 110a (Pooler, J., concurring in the denial of rehearing en banc); cf. *id.* at 100a n.2 (Cabranes, J., dissenting from the denial of rehearing en banc) ("Judge Pooler would prefer the Supreme Court's attention. So be it.") (internal quotation marks omitted). The lower court's need for guidance underscores the importance of this Court's review.

2. Although the decision below affirmed a preliminary injunction, further proceedings in the district court would not bear on the constitutional question presented here. The panel majority "conclude[d] that [Section] 7631(f), as implemented by the Agencies, falls well beyond what the Supreme Court and [the Second Circuit] have upheld as permissible conditions on the receipt of government funds." App., *infra*, 3a. Although the panel majority subsequently stated that Section 7631(f) "*likely*

violates the First Amendment by impermissibly compelling [respondents] to espouse the government's viewpoint on prostitution," the panel majority's reasoning was that Section 7631(f) *actually* violates the First Amendment because it compels such speech. *Id.* at 17a (emphasis added). Neither the panel majority nor respondents have identified how further proceedings before the district court could establish that the funding condition does not violate the First Amendment. *Id.* at 104a-105a (Cabranes, J., dissenting from the denial of rehearing en banc). Accordingly, in the face of an injunction that bars the enforcement of an Act of Congress on constitutional grounds, there is no reason to delay this Court's review.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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